Matter of Zamora v. New York Neurologic Assoc.

Court of Appeals of New York
March 20, 2012, Argued; May 1, 2012, Decided
No. 55

Reporter: 19 N.Y.3d 186; 970 N.E.2d 823; 947 N.Y.S.2d 788; 2012 N.Y. LEXIS 893; 2012 NY Slip Op 3357; 2012 WL 1499138

In the Matter of the Claim of Rocio Zamora, Respondent, v New York Neurologic Associates et al., Appellants. Workers' Compensation Board, Appellant.

Prior History: Appeal from an order of the Appellate Division of the Supreme Court in the Third Judicial Department, entered December 23, 2010. The Appellate Division, with two Justices dissenting, (1) reversed a decision of the Workers' Compensation Board which, among other things, had denied claimant's claim for workers' compensation benefits; and (2) remitted the matter for further proceedings not inconsistent with the Court's decision.
Matter of Zamora v New York Neurologic Assoc., 79 AD3d 1471, 912 NYS2d 816, 2010 N.Y. App. Div. LEXIS 9533 (N.Y. App. Div. 3d Dep't 2010), reversed.

Disposition: Order reversed, with costs, and the decision of the Workers' Compensation Board reinstated.

Core Terms

claimant, disability, workers' compensation, labor market, retire, permanent partial disability, physical limitations, earning capacity, withdrawal, unrelated, withdrawn, jobs

Case Summary

Procedural Posture
After the Workers' Compensation Board denied wage replacement benefits to respondent claimant on the ground that she had not established attachment to the labor market and continuing entitlement to benefits, the Appellate Division (New York) reversed the Board's decision. Appellants, the employer and others, challenged the Appellate Division's decision.

Overview
At the time the claimant was classified with a permanent partial disability, she was engaged in full-duty work. A few months later in 2007, she quit work because of various health issues. On appeal, the Appellate Division inferred from the fact that the claimant did not voluntarily withdraw from the workforce in 2007 that her subsequent loss of wages was attributable to her disability. It held that it was incumbent upon the employer to rebut the inference of causation or prove that the reduction in employment was solely due to factors unrelated to the disability. The court held that this was error. A claimant's work-related permanent partial disability allowed, but did not require, an inference that a subsequent loss of wages was attributable to physical limitations. Next, the court upheld the Board's finding that the claimant had not made a reasonable search for work consistent with her physical restrictions. The evidence concerning the types of work that she had attempted to find and her lack of success in those endeavors, together with the absence of evidence of attempts to find less physically taxing work, constituted relevant proof adequately supporting the Board's conclusion.

Outcome
The court reversed the order of the Appellate Division and reinstated the decision of the Board.

LexisNexis® Headnotes

Workers' Compensation & SSDI > Benefit Determinations > Permanent Partial Disabilities

HN1 A central question for the Workers' Compensation Board to resolve, before awarding wage replacement benefits in a nonschedule permanent partial disability case, is whether a claimant has maintained a sufficient attachment to the labor market. By finding alternative work consistent with his or her physical limitations, or at least showing reasonable efforts at finding such work, the claimant can prove to the Board that the cause of his or her reduced income is a disability, rather than unwillingness to work again. The claimant must demonstrate that his or her reduced earning capacity is due to the disability, not factors unrelated to the disability. In reaching its decision on this question, the Board will, of course, consider the circumstances under which claimant originally stopped full-duty work.

Evidence > Inferences & Presumptions > Inferences

Workers' Compensation & SSDI > Benefit Determinations > Permanent Partial Disabilities

HN2 If the Workers' Compensation Board determines that a workers' compensation claimant has a permanent partial disability and that the claimant retired from his or her job due to that disability, an inference that his or her reduced future earnings resulted from the disability may be drawn. The same is true regardless of whether claimant has completely retired from the work force or merely withdrawn from the particular employment in which she was engaged at the time of her accident. An inference of causation may be drawn from the disability-related withdrawal, depending on the nature of the disability and the nature of the claimant's work.

Evidence > Inferences & Presumptions > Inferences

Workers' Compensation & SSDI > Benefit Determinations > Permanent Partial Disabilities

HN3 A claimant's work-related permanent partial disability allows an inference that a subsequent loss of wages is attributable to physical limitations. The Workers' Compensation Board may, but need not, infer that the claimant cannot find a suitable job because of her disability. If, for example, the Board considers a disability to be one that prevents the claimant from pursuing the trade in which he was engaged at the time of the accident, while allowing him to undertake many other jobs that pay as well, it will likely not make the inference.

Workers' Compensation & SSDI > ... > Judicial Review > Standards of Review > Substantial Evidence

Workers' Compensation & SSDI > Benefit Determinations > General Overview

HN4 The determination that a workers' compensation claimant has not made a reasonable search for work consistent with her physical restrictions is a factual one that an appellate court must uphold as long as there is substantial evidence to support it. A court may not weigh the evidence or reject the Workers' Compensation Board's choice simply because a contrary determination would have been reasonable.

Headnotes/Syllabus

Headnotes

Workers' Compensation -- Causal Relation -- Inference That Loss of Wages Attributable to Claimant's Disability

1. The Workers' Compensation Board was not required to infer, from the finding that claimant withdrew from her employment due to an accident at her workplace, that her post-accident loss of wages was attributable to physical limitations caused by the accident. A central question for the Board to resolve, before awarding wage replacement benefits in a nonschedule permanent partial disability case, is whether the claimant has maintained a sufficient attachment to the labor market. The Board will consider the circumstances under which the claimant originally stopped full-duty work, and if the Board determines that the claimant retired from his or her job due to that disability, an inference that his or her reduced future earnings resulted from the disability may, but need not, be drawn. Here the Appellate Division inferred, from the fact that claimant did not voluntarily withdraw from the workforce, that her subsequent loss of wages was attributable to her disability, and found that it was incumbent upon the employer to rebut the inference of causation or prove that the reduction in employment was solely due to factors unrelated to the disability. The Appellate Division's recent doctrine that the Board must find causation effectively created a presumption out of an inference, which would illogically constrain the ability of the Board to find facts, and would shift the burden of proof from claimant to employer.

Workers' Compensation -- Voluntary Withdrawal from Labor Market

2. In a workers' compensation proceeding involving a claim for benefits by a phlebotomist who was injured when she was struck on her upper back by a falling computer monitor, there was substantial evidence to support the de-termination of the Workers' Compensation Board that, as of the date of the hearing held almost eight months after she stopped working, claimant had not made a reasonable search for work consistent with her physical restrictions. The determination of whether a claimant had made a reasonable search is a factual one that an appellate court must uphold as long as there is substantial evidence to support it. The appellate court may not weigh the evidence or reject the Board's choice simply because a contrary determination would have been reasonable. Here, the evidence concerning the types of work that claimant had attempted to find and her lack of success in those endeavors, together with the absence of evidence of attempts to find less physically taxing work, constitute relevant proof adequately supporting the Board's conclusion.

Counsel: *Vecchione, Vecchione & Connors*, Garden City Park (*Michael F. Vecchione* and *Sean J. McKinley* of counsel), for New York Neurologic Associates and another, appellants. I. There is a distinction between those cases where a claimant has involuntarily retired and other cases where a claimant has involuntarily withdrawn from the labor market. (*Matter of Peck v James Sq. Nursing Home*, 34 AD3d 1033, 823 NYS2d 630; *Matter of Hare v Champion Intl.*, 50 AD3d 1254, 855 NYS2d 741; *Matter of*

Leeber v LILCO, 29 AD3d 1198, 816 NYS2d 205; Matter of Tipping v National Surface Cleaning Mgt., Inc., 29 AD3d 1200, 816 NYS2d 202; Matter of Bryant v New York City Tr. Auth., 31 AD3d 936, 819 NYS2d 150; Matter of Jiminez v Waldbaums, 9 AD3d 99, 780 NYS2d 799.) II. Public policy considerations must encourage claimants to be productive within their physical limitations. (Matter of Peck v James Sq. Nursing Home, 34 AD3d 1033, 823 NYS2d 630; Matter of Tipping v National Surface Cleaning Mgt., Inc., 29 AD3d 1200, 816 NYS2d 202; Matter of Mazziotta v Brookfield Constr. Co., 40 AD2d 245, 338 NYS2d 1001.) III. Because nonretired claimants must search for work within restrictions, the claimant's failure to do so warrants that indemnity benefits cease. (Matter of Rothe v United Med. Assoc., 18 AD3d 1093, 795 NYS2d 394; *Matter of Johnson v Onondaga Heating & A.C., 301 AD2d 903, 754 NYS2d 430.)*

Eric T. Schneiderman, Attorney General, Albany (*Paul Groenwegen, Barbara D. Underwood* and *Andrew D. Bing* of counsel), for New York State Workers' Compensation Board, appellant. The Workers' Compensation Board's determination that claimant failed to show that she had sought employment consistent with her disability was based on substantial evidence and should not have been reversed on the basis of a judicially mandated inference. *(Matter of Jordan v Decorative Co., 230 NY 522, 130 N.E. 634; Matter of Matise v Munro Waterproofing Co., 293 NY 496, 58 NE2d 511; Matter of Croce v Ford Motor Co., 307 NY 125, 120 NE2d 527; Matter of Tallini v Martino & Son, 58 NY2d 392, 448 NE2d 421, 461 NYS2d 754; Burns v Varriale, 9 NY3d 207, 879 NE2d 140, 849 NYS2d 1; Matter of Bourne [Corsi], 282 App Div 1, 122 NYS2d 25; Matter of Nickens v Randstad, 18 AD3d 1008, 794 NYS2d 512; Matter of Helfrick v Dahlstrom Metallic Door Co., 256 NY 199, 176 NE 141; Matter of Chetney v Manning Co., 273 NY 82, 6 NE2d 105; Matter of Schechter v State Ins. Fund, 6 NY2d 506, 160 NE2d 901, 190 NYS2d 656.)*

Grey & Grey, L.L.P., Farmingdale (*Robert E. Grey* of counsel), for respondent. I. There is no statutory authority for appellants' contention that a permanently partially disabled worker must prove "attachment to the labor market" as a condition for receipt of benefits. *(Matter of Needleman v Queensboro Med. Group, 31 AD2d 383, 297 NYS2d 807; Matter of Carroll v Knickerbocker Ice Co., 218 NY 435, 113 N.E. 507; Matter of Waters v Taylor Co., 218 NY 248, 112 NE 727; Matter of McCormack v National City Bank of N.Y., 303 NY 5, 99 NE2d 887; Crosby v State of N.Y., Workers' Compensation Bd., 57 NY2d 305, 442 NE2d 1191, 456 NYS2d 680; Matter of Richardson v Fiedler Roofing, 67 NY2d 246, 493 NE2d 228, 502 NYS2d 125; Majewski v Broadalbin-Perth Cent. School Dist., 91 NY2d 577, 696 NE2d 978, 673 NYS2d 966; Lawrence Constr. Corp. v State of New York, 293 NY 634, 59 NE2d 630; Matter of Balcerak v County of Nassau, 94 NY2d 253, 723 NE2d 555, 701 NYS2d 700; Matter of Alonzo M. v New York City Dept. of Probation, 72 NY2d 662, 532 NE2d 1254, 536 NYS2d 26.) II. The decisions of this Court and the Appellate Division, Third Department, establish that where the injured worker's loss of earnings is caused by the compensable injury, the burden of proof rests with the employer, not the claimant. (Matter of Jordan v Decorative Co., 230 NY 522, 130 N.E. 634; Matter of Roberts v General Elec. Co., 6 AD2d 43, 174 NYS2d 533; Burns v Varriale, 9 NY3d 207, 879 NE2d 140, 849 NYS2d 1; Matter of Phonville v New York & Cuba Mail S.S. Co.,* 226 NY 622, 123 N.E. 258, 123 N.E. 885; *Drink v United States R.R. Admin., 204 App Div 164, 197 NYS 665; Bello v General Elec. Co., 204 App Div 613, 199 NYS 143; Becker v General Elec. Co., 210 App Div 495, 206 NYS 437; Matter of Parrilla v Leemar Knitting Mills,* 27 AD2d 965, 279 NYS2d 266; *Matter of Doberstein v Marshall,* 37 AD2d 1024, 325 NYS2d 360; *Matter of Ginn v Rapid Serv. Press, 222 App Div 406, 226 NYS 89, 248 NY 563, 162 NE 526.) III. There is no meaningful distinction between "retirement" and "non-retirement" cases on the issue of voluntary withdrawal from the labor market. (Matter of Leeber v LILCO, 29 AD3d 1198, 816 NYS2d 205; Matter of Jiminez v Waldbaums, 9 AD3d 99, 780 NYS2d 799; Matter of Roberts v General Elec. Co., 6 AD2d 43, 174 NYS2d 533; Matter of Topf v American Character Doll & Toy Co.,* 62 AD2d 1111, 404 NYS2d 451; *Matter of Holman v Hyde Park Nursing Home, 268 AD2d 705, 701 NYS2d 516; Matter of Kalevas v Williams & Co., 27 AD2d 22, 275 NYS2d 546, 20 NY2d 812, 231 NE2d 290, 284 NYS2d 704; Matter of Tallini v Martino & Son, 58 NY2d 392, 448 NE2d 421, 461 NYS2d 754; Matter of Papkoff v Feldman, 26 AD2d 140, 271 NYS2d 812, 19 NY2d 932, 228 NE2d 397, 281 NYS2d 339; Matter of Peck v James Sq. Nursing Home, 34 AD3d 1033, 823 NYS2d 630.) IV. The decision of the Appellate Division, Third Department, was proper as a matter of law and did not invade the Workers' Compensation Board's fact-finding authority. (Matter of Axel v Duffy-Mott Co., 47 NY2d 1, 389 NE2d 1075, 416 NYS2d 554; Matter of Kaplan v Zodiac Watch Co., 20 NY2d 537, 232 NE2d 625, 285 NYS2d 585; Matter of Konieczny v Butterflake Shop, 71 AD2d 718, 419 NYS2d 213; Matter of Seymour v Rivera Appliances Corp., 33 AD2d 958, 306 NYS2d 724; Matter of Krausa v Totales Debevoise Corp., 84 AD3d 1545, 922 NYS2d 643; Matter of LaCroix v Syracuse Exec. Air Serv., Inc., 8 NY3d 348, 866 NE2d 1004, 834 NYS2d 676; Matter of Paduano v New York State Workmen's Compensation Bd., 30 AD2d 1009, 294 NYS2d 318.)*

Law Office of Ralph M. Kirk, Kingston (*Justin S. Teff* of counsel), for Injured Workers' Bar Association, amicus curiae. I. *Matter of Zamora v New York Neurologic Assoc. (79 AD3d 1471, 912 NYS2d 816 [2010]) was correct as a*

matter of law. (Matter of Lovell v Berman's Motor Express, 35 AD2d 765, 315 NYS2d 49; Matter of Nickens v Randstad, 18 AD3d 1008, 794 NYS2d 512; Matter of Dudlo v Polytherm Plastics, 125 AD2d 792, 509 NYS2d 899; Matter of Peng Kim v Community Living Corp., 253 AD2d 911, 677 NYS2d 818; Matter of Jordan v Decorative Co., 230 NY 522, 130 N.E. 634; Matter of Coyle v Intermagnetics Corp., 267 AD2d 621, 699 NYS2d 600; Matter of Roberts v General Elec. Co., 6 AD2d 43, 174 NYS2d 533; Matter of O'Connell v New York State Workmen's Compensation Bd., 14 AD2d 945, 221 NYS2d 491; Matter of Mazziotto v Brookfield Constr. Co., 40 AD2d 245, 338 NYS2d 1001; Matter of Boyle v Gatti, 40 AD2d 1063, 339 NYS2d 65.) II. Matter of Zamora v New York Neurologic Assoc. (79 AD3d 1471, 912 NYS2d 816 [2010]) was correct as a matter of public policy. (Jiminez v Waldbaums, 9 AD3d 99, 780 NYS2d 799; Tallini v Martino & Son, 58 NY2d 892, 448 NE2d 421, 461 NYS2d 754.)

Judges: Opinion by Judge Pigott. Judges Graffeo, Read and Smith concur. Chief Judge Lippman dissents and votes to affirm in an opinion in which Judges Ciparick and Jones concur.

Opinion by: Pigott

Opinion

[824]** **[*189]** **[***789]** Pigott, J.

In this appeal we are called upon to decide whether the Workers' Compensation Board must infer, from the finding that a claimant withdrew from her employment due to an accident at her workplace, that her post-accident loss of wages is attributable to physical limitations caused by the accident. We hold that the Board is not required to draw that inference.

Claimant Rocio Zamora was working as a phlebotomist for New York Neurologic Associates, on January 29, 2003, when a **[*190]** computer monitor fell off a shelf and struck her upper back. She suffered a torn tendon in her left shoulder and two herniated discs in the cervical spine. On April 25, 2003, Zamora told her employer that she would not be returning to work because she did not feel well enough to perform her duties. Thereafter, Zamora was employed on and off, on a part-time basis, receiving workers' compensation benefits for her loss of wages attributable to the accident. She underwent spinal surgery in December 2005. On January 18, 2007, Zamora returned to full-duty work as a phlebotomist.

On May 29, 2007, following a hearing, the Workers' Compensation Board classified Zamora with a permanent partial disability. No benefits were ordered because Zamora was engaged in full-duty work at the time. Zamora continued to work until December 21, 2007, when various health issues forced her to quit. As she later explained, she had "migraines, numbness in [her] hand, [and] back pain" and she found it difficult to "use [her] hands to do the blood pressure and draw blood."

[825]** **[***790]** In 2008, Zamora posted her resume on job-search Web sites, seeking both general phlebotomy jobs and customer service positions. She had two extremely brief periods of employment as a phlebotomist at New York hospitals. On May 22, 2008, a Workers' Compensation Law Judge "continued" Zamora's case so that a hearing could be held on issues including whether she had voluntarily withdrawn from the labor market.

At the hearing, held on August 5, 2008 before a Workers' Compensation Law Judge, Zamora testified concerning her health and her attempts to find employment. Asked what injuries contributed to her disability, she mentioned her neck and shoulder, as well as health issues that she said were unrelated to her workplace accident, namely migraines, hernias, and pinched nerves in her lower back. Questioned about her attempts to find work, Zamora explained that she was trying to look for a job that was "lighter," or less physically taxing, than a phlebotomist position. She had submitted her resume for customer service positions, but those jobs and others she had tried to get required more lifting or standing than she could manage, because of her lower back condition and hernias.

The Workers' Compensation Law Judge found that Zamora had made a valid effort to find work and "ha[d] not voluntarily removed herself from the labor market." The insurance carrier of New York Neurologic Associates sought review by the Workers' Compensation Board.

[*191] On March 13, 2009, the Board denied Zamora's claim for benefits after December 21, 2007. The Board found that Zamora had "failed to conduct a reasonable job search" after December 2007, in that the "jobs under consideration by the claimant were not reasonable given her work restrictions, which primarily involve her unrelated low back condition." The Board therefore ruled that, although Zamora's original withdrawal from the job market was not voluntary, she had not established attachment to the labor market and continuing entitlement to benefits.

The Appellate Division, in a 3-2 decision, reversed the Board's determination (79 AD3d 1471, 912 NYS2d 816 [2010]). The majority inferred, from the fact that Zamora did not voluntarily withdraw from the workforce in 2007, that her "subsequent loss of wages was attributable to her disability," adding that "it was incumbent upon the employer to rebut the inference of causation or prove that

the reduction in employment was solely due to factors unrelated to the disability" (*id. at 1472* [internal quotation marks omitted]). We now reverse.

As this Court recently noted, ***HN1*** a central question for the Board to resolve, before awarding wage replacement benefits in a nonschedule permanent partial disability case, is "whether a claimant has maintained a sufficient attachment to the labor market" (*Burns v Varriale, 9 NY3d 207, 216, 879 NE2d 140, 849 NYS2d 1 [2007]*; *see Matter of Jordan v Decorative Co., 230 NY 522, 526-527, 130 NE 034 [1921]*). By finding alternative work consistent with his or her physical limitations, or at least showing reasonable efforts at finding such work, the claimant can prove to the Board that the cause of his or her reduced income is a disability, rather than unwillingness to work again. "Claimant must demonstrate that his or her reduced earning capacity is due to the disability, not ... factors unrelated to the disability" (*Burns, 9 NY3d at 216*).

In reaching its decision on this question, the Board will, of course, consider **[**826]** **[***791]** the circumstances under which claimant originally stopped full-duty work. ***HN2*** "If the Board determines that a workers' compensation claimant has a permanent *partial* disability and that the claimant retired from his or her job due to that disability, an inference that his or her reduced future earnings resulted from the disability *may* be drawn" (*id.* [emphasis added]). The same is true regardless of whether claimant has completely retired from the work force or merely withdrawn from the particular employment in which she was engaged at **[*192]** the time of her accident. An inference of causation may be drawn from the disability-related withdrawal, depending on the nature of the disability and the nature of the claimant's work.

In many of its decisions, the Third Department has noted, correctly, that ***HN3*** "a claimant's work-related permanent partial disability *allows* an inference that a subsequent loss of wages is attributable to physical limitations" (*Matter of Coyle v Internagnetics Corp., 267 AD2d 621, 622, 699 NYS2d 600 [3d Dept 1999]* [emphasis added]; *see also e.g. Matter of Mazziotto v Brookfield Constr. Co., 40 AD2d 245, 247, 338 NYS2d 1001 [3d Dept 1972]*; *Matter of Miller v Pan Am. World Airways, 46 AD2d 718, 360 NYS2d 293 [3d Dept 1974]*). Recently, however, the Third Department has treated the inference as required, or presumed, rather than merely permitted. For example, the court has written that "once claimant's work-related permanent partial disability has been established, an inference *will* arise that the subsequent loss of wages was attributable to these physical limitations" (*Matter of Johnson v Onondaga Heating & A.C. [301 AD2d 903, 905, 754 NYS2d 430 [3d Dept 2003]* [internal quotation marks and brackets omitted and emphasis added]; *see also e.g. Matter of Pittman v ABM Indus., Inc., 24 AD3d 1056, 1057-1058, 806 NYS2d 301 [3d Dept 2005]*; *Matter of Dudlo v Polytherm Plastics, 125 AD2d 792, 793, 509 NYS2d 899 [3d Dept 1986]*).

[1] The correct principle is the former one; the Board may, but need not, infer that the claimant cannot find a suitable job because of her disability. If, for example, the Board considers a disability to be one that prevents the claimant from pursuing the trade in which she was engaged at the time of the accident, while allowing her to undertake many other jobs that pay as well, it will likely not make the inference. The Third Department's recent doctrine that the Board *must* find causation "effectively created [a] ... presumption out of an inference" (*Matter of Tipping v National Surface Cleaning Mgt., Inc., 29 AD3d 1200, 1201, 816 NYS2d 202 [3d Dept 2006, Carpinello, J., concurring]*; *see also 79 AD3d at 1473* [Cardona, P.J., and Garry, J., dissenting]). There is no precedent in our decisions for this theory, which would illogically constrain the ability of the Board to find facts, and would shift the burden of proof from claimant to employer. Consequently, the Appellate Division's decision below was in error.

[2] Finally, we consider the Board's finding that, as of August 2008, Zamora had not made a reasonable search for work consistent with her physical restrictions. ***HN4*** That determination is a factual one that an appellate court must uphold as long as there **[*193]** is substantial evidence to support it (*see generally Matter of Capizzi v Southern Dist. Reporters, 61 NY2d 50, 54, 459 NE2d 847, 471 NYS2d 554 [1984]*; *Matter of Axel v Duffy-Mott Co., 47 NY2d 1, 6, 389 NE2d 1075, 416 NYS2d 554 [1979]*). We may not weigh the evidence or reject the Board's choice simply because a contrary determination would have been reasonable. Here, the **[**827]** **[***792]** evidence concerning the types of work that Zamora had attempted to find and her lack of success in those endeavors, together with the absence of evidence of attempts to find less physically taxing work, constitute relevant proof adequately supporting the Board's conclusion. Therefore, we are satisfied that there was substantial evidence to support the Board's determination.

Accordingly, the order of the Appellate Division should be reversed, with costs, and the decision of the Workers' Compensation Board reinstated.

Dissent by: LIPPMAN

Dissent

Chief Judge Lippman (dissenting). Nearly a century ago in *Matter of Waters v Taylor Co. (218 NY 248, 251-252, 112 NE 727 [1916])*, we held that what was then known as the Workmen's Compensation Act

> "[wa]s framed on broad principles for the protection of the work[er]. Relief under it ... rest[ed] on the economic and humanitarian principles that compensation should be given ... for earning capacity destroyed by an accident in the course of or connected with [one's] work, and this not only for [the worker's] own benefit[,] but for the benefit of the state[,] which otherwise might be charged with [the worker's] support."

Because the majority's holding lacks statutory support and runs counter to the remedial purpose of the Workers' Compensation Law, I respectfully dissent.

"Attachment to the labor market" is a concept that is conspicuously absent from the Workers' Compensation Law. The majority's formulation of the issue in this case distracts from the proper identification of the question before the Court, which is whether a worker who has involuntarily withdrawn from his or her employment due to a compensable disability must demonstrate "attachment to the labor market" in order to be eligible to receive benefits. Nothing in the statute suggests that this is a prerequisite to entitlement to workers' compensation benefits.

An inference that the loss in wage earning capacity is due to the permanent partial disability (PPD) arises where the **[*194]** claimant left his or her job because of that disability (*see Matter of Leeber v LILCO (29 AD3d 1198, 1199, 816 NYS2d 205 [3d Dept 2006]* [holding that "if claimant's permanent partial disability caused or contributed to his decision to retire, an inference arises that his earning capacity is reduced by the disability and claimant is entitled to compensation until the inference is removed from the case"]; *Matter of Tipping v National Surface Cleaning Mgt., Inc., 29 AD3d 1200, 1201, 816 NYS2d 202 [3d Dept 2006]* [holding that "the (Worker's Compensation) Board's initial determination that claimant's retirement was involuntary gave rise to an inference that his reduced earning capacity continued after retirement"]). The claimant's employer or the insurance carrier can rebut the inference by presenting "direct and positive proof that something other than the disability was the sole cause of claimant's reduced earning capacity after retirement" (*Matter of Pittman v ABM Indus., Inc., 24 AD3d 1056, 1058, 806 NYS2d 301 [3d Dept 2005]*). I see no logical reason to treat the involuntary withdrawal that occurred in this case any differently from the Third Department's treatment of involuntary retirement, which is consistent with the Workers' Compensation Law's plain language and core objectives.*

[828]** **[***793]** Whether a claimant suffering from a PPD has maintained an "attachment to the labor market" should only be considered where the claimant seeks total disability compensation (*see e.g. Matter of Parrilla v Leemar Knitting Mills*, 27 AD2d 965, 279 NYS2d 266 [3d Dept 1967]), or where the claimant has voluntarily withdrawn from the labor market (*see e.g. Matter of Peck v James Sq. Nursing Home, 34 AD3d 1033, 1034, 823 NYS2d 630 [3d Dept 2006]* [holding that the "claimant [suffering from a PPD] ha(d) an obligation to demonstrate attachment to the labor market with evidence of a search of employment within medical restrictions," where there was "no finding of involuntary retirement"]). This is consistent with the purpose of the Workers' Compensation Law, which is to compensate for the claimant's loss in wage earning capacity. It is reasonable that a claimant suffering from a PPD who has **[*195]** left his or her job voluntarily--that is to say, for reasons unrelated to the disability--should not benefit from the inference that the loss in wage earning capacity is due to the disability, precisely because the claimant chose to leave his or her employment and was not forced to do so by reason of the compensable disability. Indeed, *Matter of Jordan v Decorative Co. (230 NY 522, 130 NE 634 [1921])*, relied upon by the majority, was a case in which, unlike here, the claimant obtained a new job after leaving the job where he sustained his disability, and refused a position offered by his new employer even though he was physically able to do the work. The claimant in *Jordan* affirmatively refused work and voluntarily left his new position even though there was no shortage of work there that he was physically capable of doing. Nothing of the sort occurred in this case. There is no evidence tending to suggest that claimant, who suffered permanent injuries requiring spinal fusion surgery when a computer monitor fell and struck her, either affirmatively refused work that she could do or voluntarily left any job. Indeed, quite the opposite is true. Below, the Workers' Compensation Board concluded that claimant involuntarily left her job at New York Neurologic Associates (meaning that her decision to withdraw from that position was related to her PPD), and attempted to find work elsewhere but found that she suffered from certain physical limitations that prevented her from performing tasks essential to those forms of employment, such as heavy lifting.

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* In *Burns v Varriale* (9 NY3d 207, 879 NE2d 140, 849 NYS2d 1 [2007]), cited by the majority (*see* majority op at 191-192), this Court was called upon to address a question entirely different from the one raised by this case. *Burns* was a "proceeding to extinguish a lien asserted pursuant to Workers' Compensation Law § 29" (9 NY3d at 210). Although *Burns* referred to the inference discussed in *Leeber* and *Tipping*, contrary to the majority's suggestion, *Burns* did not squarely address the issue before the Court on this appeal.

The majority extends the rule regarding "attachment to the labor market" beyond the limits that can reasonably be imposed on the application of such a rule when considering the remedial and humanitarian roots of the critically important statute that we address today. Workers' compensation benefits are intended to do what the name implies: compensate workers for losses in wage earning capacity incurred due to work-related injuries. To impose barriers to access to those benefits, where there is no basis for such prerequisites, contravenes the law and violates basic principles of fairness for debilitated workers injured in the course of their employment. For these reasons, I respectfully dissent and would affirm the order of the Appellate Division.

Judges Graffeo, Read and Smith concur with Judge Pigott; Chief Judge **[**829]** **[***794]** Lippman dissents and votes to affirm in a separate opinion in which Judges Ciparick and Jones concur.

Order reversed, etc.